

Migrations in the Mediterranean Between Protection of Human Rights and Border Control. An Italian Perspective

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L'intégration européenne. Soixante ans du *Traité de Rome* : tous les chemins mènent-ils encore à Bruxelles ?

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Résumé de l'article

La migration à travers la Méditerranée ne devrait plus aujourd'hui être considérée comme une urgence. La première urgence est toujours celle de sauver des vies sur la mer, et l'opération italienne « Mare Nostrum » en fut un bon exemple, qui ne fut pas suivi de choix cohérents de l'Union européenne. En ce moment, les priorités de l'Union européenne en matière de politiques publiques et d'actions apparaissent être liées à la surveillance des frontières et à la lutte contre la traite et le trafic de migrants. Le « système Dublin » de l'Union européenne fait maintenant face à une crise énorme et les nouveaux modèles, en particulier l'Énoncé adopté conjointement avec la Turquie, ne sont pas convaincants d'un point de vue juridique, principalement puisque les réfugiés méritent une attention spéciale, basée sur le principe du non-refoulement. Il est temps de mettre de côté la logique de l'urgence et de formuler une politique durable pour la gestion des migrations, mettant en oeuvre le *Traité de Lisbonne* et les principes *CFR* basés sur la solidarité et le respect des droits humains, ainsi que sur une réelle coopération entre les États.

MIGRATIONS IN THE MEDITERRANEAN BETWEEN PROTECTION OF HUMAN RIGHTS AND BORDER CONTROL. AN ITALIAN PERSPECTIVE

*Giuseppe Cataldi**

Migration through the Mediterranean has to be considered nowadays no more as an emergency. The first urgency is always to save lives at sea, and the Italian *Mare Nostrum* Operation has been a good example, not followed by EU choices. At the moment border surveillance and the fight against trafficking and smuggling of migrants seem to be the priorities in EU policy and action. The EU *Dublin System* is now facing a huge crisis and the new models, in particular the Statement agreed with Turkey, do not convince from a legal point of view, mainly because refugees deserve a special attention, based on the *non-refoulement* principle. The time has come to exit the logic of emergency and formulate a lasting policy to manage migrations, implementing *Lisbon Treaty* and *CFR* principles based on solidarity and respect of human rights, as well as on true cooperation among States.

La migration à travers la Méditerranée ne devrait plus aujourd'hui être considérée comme une urgence. La première urgence est toujours celle de sauver des vies sur la mer, et l'opération italienne « Mare Nostrum » en fut un bon exemple, qui ne fut pas suivi de choix cohérents de l'Union européenne. En ce moment, les priorités de l'Union européenne en matière de politiques publiques et d'actions apparaissent être liées à la surveillance des frontières et à la lutte contre la traite et le trafic de migrants. Le « système Dublin » de l'Union européenne fait maintenant face à une crise énorme et les nouveaux modèles, en particulier l'Énoncé adopté conjointement avec la Turquie, ne sont pas convaincants d'un point de vue juridique, principalement puisque les réfugiés méritent une attention spéciale, basée sur le principe du non-refoulement. Il est temps de mettre de côté la logique de l'urgence et de formuler une politique durable pour la gestion des migrations, mettant en œuvre le *Traité de Lisbonne* et les principes *CFR* basés sur la solidarité et le respect des droits humains, ainsi que sur une réelle coopération entre les États.

La migración a través del Mediterráneo ya no debería considerarse una emergencia hoy en día. La primera urgencia siempre es salvar vidas en el mar, y la operación italiana "Mare Nostrum" ha sido un buen ejemplo, a la cual no siguieron decisiones juiciosas por la Unión Europea. En la actualidad, la vigilancia de las fronteras y la lucha contra la trata y el tráfico ilícito de migrantes parecen ser las prioridades en las políticas públicas y las acciones de la UE. El "sistema de Dublin" de la UE se enfrenta ahora a una gran crisis y los nuevos modelos, en particular la *Declaración UE-Turquía*, no convencen desde un punto de vista legal, principalmente porque los refugiados merecen una atención especial, basada en el principio de no devolución. Ha llegado el momento de salir de la lógica de la emergencia y de formular una política duradera para gestionar las migraciones, implementando el *Tratado de Lisboa* y los principios *MCR* basados en la solidaridad y el respeto de los derechos humanos, así como en una verdadera cooperación entre los Estados.

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I. Humanitarian needs, border management and the activity of prevention and repression of crimes

Its extensive coastal area, its position in the centre of the Mediterranean, its proximity to the Southern shores, its membership in the European Union (EU). All these aspects concur in making Italy an absolute protagonist in all the international issues that take place in this sea. It was therefore inevitable that Italy should hold a primary role in the management of the migratory flows that are taking place throughout Europe.

Because of the economic crisis and the widespread political instability that exists throughout the African continent, and that has become more acute because of the “Arab Springs”, the departure of migrants seeking a better life in Europe is now a constant, one that certainly cannot be defined as an “emergency” but rather as a physiological and structural datum. As we are all aware, the right of each human being to migrate is not matched by the corresponding duty of the State of destination to welcome such an individual¹. Thus, the massive phenomenon of unauthorized migration, in respect of which a general distinction is generally made between forced migration, caused by the need to escape political persecutions or contingent events - war, revolution, environmental disasters - and migration for economic reasons as a result of endemic and unbearable poverty². We must nevertheless express reservations concerning this distinction. Indeed, it is not always easy to make a distinction between economic migrants and forced migrants. First of all, current international migrations are a mixture while the routes and methods of transportation used are similar. Furthermore, since there are no legal channels of entry available, both economic migrants and asylum seekers use the same criminal organizations to organize their journeys. And the conditions of the individual in the course of migration can vary significantly³.

The transit of migrants is highly dramatic in the Mediterranean because migration by sea, though a minority percentage of the entire phenomenon, involves serious risks to human life if one considers the type of transportation used. It is a fact that transnational criminal organizations control and profit from the entire chain of migratory movements, from departure, frequently from sub-Saharan countries, to transit through the desert, to detention in “clearing houses” based along the southern

¹ Tullio Scovazzi, “Human Rights and immigration at sea” in Ruth Rubio-Marin ed, *Human rights and immigration* (Oxford: Royaume-Uni, 2014) at 212.

² S Trevisanut, *Immigrazione irregolare via mare. Diritto internazionale e diritto dell’Unione europea*, (Naples: Jovene Editore, 2012) at 1.

³ Consider for example a person leaving his country in search of a better life who, once he reaches his country of destination, becomes aware of his homosexual orientation, one that is harshly punished in his homeland. In light of the changed circumstances, such a person could legitimately aspire to international protection. Another example could be that of a woman who has freely left her country of origin, who becomes the victim of human traffickers during the migration, submitting an application for asylum to remove herself from the punishment of traffickers or her family of origin in the event of repatriation. Or a departure for economic or family reasons from a country that subsequently undergoes a coup d’état or is involved in a conflict thus making it impossible for said person to return as he would be subjected to danger.

shore of the Mediterranean, to embarkation on “mother” ships from which the migrants are then transferred to small, dilapidated boats directed toward the shores of European countries, up to the “assistance” required by the migrants once they reach land to arrive at their final chosen destination. The “corridors” most frequently used by these boats are: The Channel of Sicily, the Ionian Sea and the Straits of Gibraltar. These corridors continue to be used even after the collapse of Syria, due to the so-called “Statement” between European Union States and Turkey - commented in the next paragraph - which, de facto, closed the “land routes” through Turkey, Greece, Macedonia, Serbia, Hungary.

How do we deal with this phenomenon? The legal instruments available, national and supranational, appear to be inadequate and often obsolete. Responding to - actual or alleged - “emergencies” has been, and still is, for example, the underlying principle of Italian migration policy since 1989 when the so-called *Martelli Law* was passed, a principle that has been applied every time, from the “North-Africa emergency”, to the “Balkan emergency”, the “terrorism emergency” and “the nomad emergency”. The intervention of the EU was also sought throughout all these phases and the Union never failed to give proof of its immobility when faced with the escalation of migratory flows across the Mediterranean and the increased number of tragedies at sea, all because of the ever-present discord among its Member States. The challenge, for countries of the Northern Shore and especially for an EU that with the *Lisbon Treaty* decided to implement a common migration policy, is that of conciliating humanitarian aspects, always a priority, with the need for border control and the prevention and suppression of criminal acts. Naturally, as so many have requested, the problem needs to be solved at the root, by acting on the causes that lead people to abandon their homeland, and thus the solution is to be found “on land” rather than at sea, but obviously, this issue is significant enough to merit much greater attention than can be provided in this article.

On a strictly humanitarian level, the most significant example of an intervention is *Operation Mare Nostrum*, inaugurated by Italy following the tragedy that took place off the coast of Lampedusa’s island on October 3, 2013, that caused more than 350 victims. This operation, which lasted up to the end of 2014, was strictly national, though wholly in compliance with EU principles. Means and men from various administrations were used in a vast area of the Mediterranean (up to the Libyan coastline), and the number of interventions carried out and human lives saved was truly enormous. But the high cost of this operation, and the criticism of many partners of the Union, led to its cessation. The primary criticism set forth both by the domestic political opposition as well as by European governments (especially Greece and Spain) alleging that the undertaking would serve as an incentive, a “calling effect”, to departures, as there was a greater possibility of being intercepted in a vast area, “saved” by Italian Coast Guard cutters and accompanied to the ports of the peninsula. A criticism obviously negated by the tragic events that took place in the months following the conclusion of *Operation Mare Nostrum*⁴. The incentive to departures, and

⁴ Departures take place continuously, as do the tragedies at sea, such as the tragedy occurring on the night of 18 April 2015, with an estimated number of between 700 and 900 dead.

this is confirmed by the numbers and by the continuous tragedies at sea, is only determined by the socio-political conditions of the countries of origin and of transit, to which we must add a few contingent initiatives, such as the construction of “walls” of containment along the land borders of EU Member States and by Third Countries, the energetic means of dissuasion used by Greece and Spain to push back migrants (as noted by several humanitarian organizations), and the new restrictive visa policies implemented by many countries of northern Europe.

Operation Mare Nostrum was replaced by *Operation Triton*, which had very different characteristics. First, though the operation is conducted in maritime spaces close to the Italian coastline - with an initial limit of 30 miles, later brought to 138 miles after the tragedy at sea of 18 April 2015 - is managed and financed by the EU, specifically with the involvement of the *Frontex Agency*⁵. Second, the primary purpose of this operation is border surveillance, though in observance, as affirmed by its Executive Director, of the need to protect human life at sea⁶. It follows that rescue at sea of migrants continues to be entrusted to the authorities of coastal States, *in primis* Italian ones. We believe this consideration to be a valid one even after the extraordinary meeting of the European Council held on 23 April 2015, convened following the tragedy at sea of April 18. The final document triples the financial commitment of the EU and states that Council members reached an agreement to intensify the fight against migrant trafficking. However, no importance is given to the need to institute an extraordinary humanitarian operation in the Mediterranean and in countries of origin and of transit. Rescue and assistance operations thus remain functional to the prevention and suppression of illegal immigration, in compliance with the original mandate of *Operation Triton*. Nothing has substantially changed with the new *Operation Themis*, launched on 1 February 2018. In principle search and rescue remains as a priority, together with regional intelligence activities, but with the important and significant new possibility of transferring people rescued to the nearest port, which can also be the one from where they had begun their voyage in Tunisia, Libya, Algeria and so on.

Recent developments prove that, rather than leading to the much-desired reversal, the EU continues along its path of combating illegal immigration by sea this time by recurring to a military mission. We refer to *EUNAVFORMED*, soon renamed *EUNAVFORMED*. *Operation Sophia*, a naval operation intended to “[...] dismantle the business model of human trafficking networks in the south-

⁵ Frontex (complete name: “European Agency to coordinate cooperation along the external borders of Member States of the European Union”). The agency was created by the EU institutions, with headquarters in Warsaw, and is tasked with coordinating border patrols along air, maritime and land borders of all EU Member States, as well as the implementation of the agreements with countries bordering the Union for readmission of migrants from non-EU countries who were denied entry along the borders.

⁶ As stated upon launching *Operation Triton*: “I would like to underline that operation Triton focuses on border control and surveillance. Having said that saving lives will remain an absolute priority for Frontex” EC, European border and coast guard agency, *Frontex launches Joint Operation Triton*, (2014), online: <<https://frontex.europa.eu/media-centre/news-release/frontex-launches-joint-operation-triton-JSYpL7>>.

central Mediterranean by implementing systematic measures to identify, stop and disable the means used or suspected of being used [...] by traffickers"⁷. The mission calls for three successive phases of operations. First, the identification and monitoring of criminal networks, followed by the exercise of police powers against suspected traffickers, and finally the destruction of suspicious crafts. Furthermore, the mission was originally to have taken place both in international waters and in Libyan waters, as the majority of migrants undertake the route toward northern shores of the Mediterranean from Libyan coasts. In practice, however, as happened in previous contexts – *in primis* the interventions to combat Somali piracy – access to foreign territorial waters for purposes of enforcement is subordinate to either the consent of the coastal state – in this case Libya – or to a resolution of the UN Security Council. Lacking Libyan authorization (and we doubt that at the time of this writing there even is an effective Libyan authority that could issue such an authorization), the EU succeeded in obtaining only a very timid and ambiguous mandate from the UN Security Council, authorizing the use of force against traffickers, but limited only to the high seas⁸. In June 2016 the mandate for the first European anti-trafficking military mission was extended⁹; in addition to the one-year extension, two tasks were added to the mission, one concerning the training of the Libyan coast guard and navy, the other referring to the contribution to the implementation of the United Nations embargo on weapons¹⁰. On 25 July 2017, the EU Council extended the mandate of *EUNAVFORMED Operation Sophia* until 31 December 2018. The Council also amended the mandate of the operation in order to: establish a mechanism for monitoring staff training to ensure the long-term efficiency of Libyan Coast Guard training; carry out new surveillance activities and collect information on illicit traffic in oil exports from Libya, in accordance with UNSC Resolutions 2146 (2014) and 2362 (2017); improve the possibilities for the exchange of information on trafficking in human

⁷ EC, Council decision on a European Union military operation in the Southern Central Mediterranean, [2015] OJ, L 122/31; See also : Giorgia Bevilacqua, "The Use of Force against the Business Model of Migrant Smuggling and Human Trafficking to Maintain International Peace and Security in the Mediterranean" in Giuseppe Cataldi, ed, *A Mediterranean Perspective on Migrants' Flows in the European Union: Protection of Rights, Intercultural Encounters and Integration Policies*, (Italia: EU Jean Monnet Centre of Excellence on the protection of Migrants, 2016) at 119; See also : Efthymios Papastavridis, "EUNAVFOR MED Operation Sophia and the question of jurisdiction over transnational organized crime at sea", *Questions of International Law* (2016) 30, at 19, online: <www.qil-qdi.org/eunavfor-med-operation-sophia-question-jurisdiction-transnational-organized-crime-sea/>.

⁸ UNSC, 2015, 7532th Mtg, UN Doc S/RES/2240 (2015); See also: Marco Gestri, "EUNAVFORMED: Fighting Migrant Smuggling under UN Security Council Resolution 2240", *The Italian Yearbook of International Law* (2016) 25:1, at 21; See also: Irini Papanicolopulu, Amedeo Antonucci & Tullio Scovazzi eds, *Immigrazione irregolare via mare ed esercizio della giurisdizione: il contesto normativo internazionale e la recente prassi italiana*, (Torino: 2016); Ilaria Tani, *Le forme di contrasto al fenomeno dell'immigrazione irregolare attraverso il Mediterraneo nell'ambito dell'Unione europea*, ibidem , p. 155.

⁹ EC, Sitting of Tuesday June 21th 2016, [2016] JO L-162/1 at 18.

¹⁰ The Security Council has imposed, amended and reconfirmed a weapons embargo against Libya by resolutions 1970 (2011), 1973 (2011), 2009 (2011), 2040 (2012), 2095 (2013), 2144 (2014), 2174 (2014), 2213 (2015), 2214 (2015) and 2278 (2016); See also: Sergio Carrera & Leonhard Den Hertog, "Whose Mare? Rule of Law Challenges in the field of European Border Surveillance in the Mediterranean", *CEPS Paper in Liberty and Security in Europe*, 79 (2015), at 17.

beings with law enforcement agencies of the Member States, *FRONTEX* and *EUROPOL*¹¹.

After the humanitarian needs, always to be considered a priority, and the question of border management, the activity of prevention and repression of crimes is without doubt a significant aspect in managing the phenomenon of migration by sea, both from the aspect of the right to exercise force against a ship and the persons on board, and the right to exercise jurisdiction, obviously using different methods and rules according to the marine spaces involved¹². Traffickers are unquestionably criminals and the criminal legislation of the States involved should be applied against them, specifically within the context of the *Palermo Protocol* of 2000 against the contraband of migrants by land, sea and air, supplementing the *United Nations Convention against transnational organized crime*¹³, and encouraging international cooperation among police forces and courts. On this point, we underline the importance of some recent decisions of the Italian *Corte di Cassazione*, whose common denominator is the illegal conduct, directly attributable to a unitary criminal intent, that takes place partly in spaces under Italian jurisdiction and partly on the high seas. Some time ago the criminal organizations involved in the traffic of human beings came up with a new system, one as effective as it is cynical, to facilitate the transit by sea of unauthorized immigrants, minimizing the risk of being intercepted by the police forces of the landing State. A “mother ship” takes off from North African coasts and, once on the high seas, transfers the migrants to inflatable dinghies or small boats lacking any safety measures, usually leaving one of the migrants with no knowledge of sailing to steer the raft toward the coasts of the northern Mediterranean. At this point the “mother ship” heads back to the port from which it left, after launching a rescue signal (SOS) in order to involve, and thus instrumentalize, police units of the landing State (usually Italy). The landing State cannot, of course, help but intervene for humanitarian reasons, carrying out what is technically known as a *SAR* (Search and Rescue) intervention, in accordance with the 1979 International Convention on Search and Rescue at Sea. The obligation in question has been reiterated, specifically regarding Italy, by the famous ECtHR (Grand Chamber) Judgment of 22 February 2012 (*Hirsi Jamaa et al/Italy*), which also clarified the validity of the obligation of *non-refoulement* in maritime spaces, that is that the high seas are to be equated to a national frontier, requiring the application of the same principles as in the event of “occupation” by the military ships of a State (in this case Italy) involved in the rescue and ascertainment of the refugee status of the persons on board. Consequently, Italy was convicted because of its forced accompaniment to Libya (in application of the *bilateral Treaty Italy-Libya*)

¹¹ EC, EUNAVFOR MED Operation Sophia: mandate extended until 31 December 2018 (Strasbourg, 2017).

¹² Umberto Leanza & Francesca Graziani, "Poteri di enforcement e di jurisdiction in materia di traffico di migranti via mare: aspetti operativi nell'attività di contrasto", in Tullio Scovazzi ed, *La Comunità internazionale*, 2 (2014), pp 163-209.

¹³ Convention and Protocols against transnational organized crime and the Protocols Thereto, 15 November 2000 (entered into force 29 September 2003).

of the persons rescued¹⁴. Italian case law very effectively highlighted that according to penal law (Art. 54.3 of the *Italian Criminal Code*), in the cases brought before the courts the action of the rescuers is considered as the “action of an indirect perpetrator”. The rescue is thus considered, “not as an unforeseeable event but one that is foreseen, wanted and caused”, and that since the state of need is attributable to and caused by traffickers, the activity of the latter is “punishable in our nation” even though carried out in an extraterritorial context¹⁵.

Without underestimating the need to prevent and suppress the above described phenomenon, it must be said that it is too simple to conclude that migrants are the victims of traffickers with no scruples who profit from the trips they organize for thousands of desperate persons. In fact, illegal migrants are above all the victims of a frontier or, to be more precise, they are victims of those who persist in not understanding that a frontier and the pushbacks that are its consequences are not useful in dealing with a collective human drama that is assuming increasingly daunting proportions because of the despair that leads these persons to leave, even at the risk of their lives, and to escape situations that have been created with the complicity of western governments. The trafficker, as much of a criminal as he may be, is the natural element of a global situation in which, while merchandise and capital continue to regularly and freely cross the frontiers, human beings, or better yet, the most unfortunate of human beings, cannot. And it is certainly not possible to believe that the best way to lessen the number of victims at sea is to attempt to enter into cooperation agreements with the countries of origin and transit. The times required for these negotiations are long, and in the meantime, persons continue to die. In addition, the majority of migrants are escaping from dictatorships and wars fuelled by those very countries with which the EU would like to negotiate.

To say that negotiations for the stipulation of new bilateral agreements are an “immediate priority” means recognizing that the cooperation of countries like the Sudan, Eritrea, Niger, Chad, Gambia and Mali is necessary in order to stop and detain migrants before they can reach Europe¹⁶.

¹⁴ Anna Liguori, "La Corte europea dei diritti dell'uomo condanna l'Italia per i respingimenti verso la Libia del 2009: il caso Hirsi", (2012) 2 Rivista di Diritto internazionale 415. It has to be mentioned that similar events happened on the 6 November 2017, when the NGO Ship Sea-Watch was hindered by the Libyan Coast Guard during a rescue operation of 130 migrants from a drifting dinghy, who had left the Libyan coast. At least twenty of the migrants died, including two minors. An appeal to the European Court of Human Rights has been lodged by 17 Nigerian applicants. See: "Respingimenti in Libia: il dossier e il video della conferenza stampa sul ricorso alla CEDU", online: (2018) *Associazione per gli studi Giuridici sull'immigrazione*, <https://www.asgi.it/allontamento-espulsione/respingimenti-libia-ricorso-cedu/?utm_source=ECRE+Newsletters&utm_campaign=1bf717a900-EMAIL_CAMPAIGN_2018_05_18&utm_medium=email&utm_term=0_3ec9497afd-1bf717a900-420537749>.

¹⁵ Among the many cases, see for example, Corte di Cassazione, Penal Section I, 23 January 2015, n. 3345; Corte di Cassazione, Penal Section I, 27 May 2014, n. 14510; Corte di Cassazione, Penal Section I, 23 May 2014, n. 36052. For a Commentary see G Cataldi, in *The Italian Yearbook of International Law*, 2014, at 475.

¹⁶ EC, Communication from The Commission to The European Parliament, The European Council and the Council, *Progress report on the Implementation of the European Agenda on Migration*, (Brussels: EC, 2018).

II. The question of Refugees

A few words should be said regarding the issue of refugees. On June 26, 2013, the EU adopted what is known as the “asylum packet”, consisting of two directives and two regulations (the “Dublin System”), to which we must add a recast of the “qualification” directive adopted in 2011¹⁷. This reform, though introducing novelties and improvements compared to the past, does not appear to be an appropriate instrument to aid in reaching the final objective, that is “independent of the Member State in which the application for asylum is presented [...] ensure that similar cases are treated in a similar manner, reaching the same result”¹⁸, because of the ample discretionary power that is granted to Member States. Negotiations, therefore, are underway for the revision of the entire “asylum packet”.

Following the entry and the identification of the asylum seeker, competence for reviewing the application for international protection belongs to a single Member State, usually the one in which the initial entry of the migrant, legal or illegal, took place (exceptions are envisaged in the greater interest of minors and to ensure the right to family unification). The goal is to prevent the asylum seeker from submitting an application to several Member States (asylum shopping), as well as to decrease the number of “orbiting” asylum claimants, that is migrants who are transported from Member State to Member State. According to the *Dublin regulation*, if a person who had submitted an application for asylum in one country of the Union, or was identified upon entering that country, enters another member country, he must be sent back to the former. This mechanism is based on trust between Member States that consider themselves mutually “safe” for purposes of the application of Union principles and norms on asylum, principles based on the 1951 *Geneva Convention on refugees* and thus, first of all, on the principle of *non-refoulement*.

Implementation of the criterion of “initial entry” nevertheless produced a disproportionate degree of pressure on border States that have not always been capable of adequately fulfilling the needs of acceptance and review of asylum applications¹⁹.

¹⁷ Directive 2013/32/EU establishing a common procedure for granting and withdrawing international protection, and 2013/33/EU, laying down standards for the acceptance of applicants for international protection; regulations 604/2013/EU, establishing the criteria and mechanisms to determine the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person, and 603/2013/EU, on Eurodac (system for the comparison of digital fingerprints of asylum applicants and some categories of illegal immigrants). These acts were adopted in accordance with the ordinary legislative procedure (art 294 TFEU – former art 251 TEC) that, together with the Lisbon Treaty, has become the primary legislative procedure of the EU decision-making process. On December 13, 2011, Directive 2011/95/EU was adopted, establishing the standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection and for the content of the protection granted, replacing Directive 2004/83/EU. See also: G Cataldi, A Del Guercio & A Liguori, eds, *Il Diritto di asilo in Europa* (Naples: University press, 2014).

¹⁸ EC, Stockholm Program – An open and secure Europe saving and protecting citizens, [2010] OJ, C 115/1.

¹⁹ EC, Communication from the Commission to the European Parliament, European Economic and Social Committee and Committee of the Regions, *European Agenda on Migration*, (Brussels: EC, 2005). In 2014 five Member States (including Italy) processed 72% of all asylum applications.

This criterion also contributes to the increase in deaths at sea, as migrant traffickers organize longer and riskier trips to Italy instead, for example, to Malta and Cyprus, aware that there is a better chance of acceptance of applications for international protection in Italy. Finally, the belief that Member States must always be considered mutually secure for purposes of reception has been refuted by European Courts. The ruling handed down by the ECtHR (Grand Chamber), Judgment of 21 January 2011 (M.S.S./Belgium and Greece), condemned Belgium for having sent an asylum seeker back to Greece, the country of initial entry, pursuant to the *Dublin Regulation*²⁰. The Strasbourg judges stated that compliance with the EU Law does not exempt from responsibility for violation of Art. 3 of the *European Convention on Human Rights (ECHR)*, prohibiting “inhuman and degrading treatment”, in light of the conditions of asylum seekers in Greece. The more so considering that the *Dublin Regulation* contemplates a clause “of sovereignty” that allows the Member State to assume responsibility for the request for protection even when not of its competence. Even more interesting and recent is the ECtHR (Grand Chamber) Judgment of 4 November 2014, (Tarakhel/Switzerland). Before Switzerland’s refusal to grant asylum to an Afghan family because they had to be returned to Italy, country of initial entry, the refugees appealed before the Court of Strasbourg, also in accordance with Art. 3 of the *ECHR*. The Court sentenced the Convened State because, according to the data provided by the Italian Interior Ministry, there was an obvious discrepancy between the number of asylum applications and the places available in SPRAR structures (Protection System for Asylum Seekers and Refugees). Switzerland therefore had the duty not to automatically apply the Dublin System, since the lack of “systemic deficiencies” in Italy (deficiencies noted by the Court in respect of Greece in the previously cited case) cannot exempt the State from ascertaining whether there is a real risk of inhuman and degrading treatment in the country of destination, especially when minors are involved, as in this specific case.

Similar principles were also affirmed by the ECJ, specifically in the preliminary ruling handed down on 21 December 2012, Case C-411/10 (N.S.) referred by a court of the United Kingdom. The ECJ confirmed the presumption of safe country status to be attributed mutually among Member States, a presumption that, however, is not absolute, but relative; it thus established the obligation to suspend transfers in cases in which the authorities of the sending State “cannot ignore the fact that systemic deficiencies in the asylum procedure and conditions for welcoming asylum applicants in the Member State are serious and proven grounds for believing that the applicant may risk being subjected to inhuman or degrading treatment”, as such is forbidden by Art. 4 of the *EU CFR*.

Other issues concerning the common European asylum system were raised concerning persons belonging to “vulnerable categories”, specifically minors, who can be subjected to administrative detention, in addition to accelerated procedures in

²⁰ Anna Liguori, “Clausola di sovranità e regolamento “Dublino III”, in Giuseppe Cataldi, Adele Del Guercio & Anna Liguori eds, *Il diritto de asilo in Europa* (Napoli: University press, 2014), at 43; See also: Conference Reports, *Il sistema di Dublino versus la libertà di movimento dei rifugiati in Europa* (Rome: the Chamber of Deputies, 2014) at 96.

examining the application for international protection, and who thus appear not to be sufficiently protected. Even the correct and uniform assessment of the concept of “safe third country” to which to send the foreigner is far from being defined. Is the “safety” requirement the only valid one? And how can this be ascertained? It is certainly not sufficient for Third States to simply meet the requirements of ratifying treaties on human rights or to provide government assurance, as frequently pointed out by the case law of the ECtHR.

Indeed, it is not surprising that the Dublin system, the object of much criticism by the European Commission as well as by doctrine and by associations active in the defence of human rights, is being reviewed. The 2015 European crisis of migrants saw an even sharper division, compared to the past, among Member States regarding the overall approach and the measures to be adopted. On 23 June, 2015 Hungary began to push back migrants along the border with Serbia. On August 24, 2015, Germany on the other hand decided to suspend the Dublin Regulation as it applied to Syrian refugees and to process their applications for asylum directly, announcing that it would welcome all refugees from that country. This last position, though commendable from a humanitarian aspect, poses the problem of “selective acceptance”. There is no doubt that there are serious and unexpected situations that require an immediate response, but it is difficult to diversify persons having the same rights, according to nationality. This is also in conflict with the 1951 *Geneva Convention* on recognition of refugee status, which prohibits any discrimination in benefiting from guaranteed rights.

On September 23, 2015, the EU Council of Ministers endorsed the proposal of the Commission, instituting a mechanism for resettlement to other countries, mainly Germany, France and Spain, of part of the asylum applicants in Italy, Greece and Hungary. The quota assigned to each country will depend on its NGP, level of unemployment, number of inhabitants and the number of asylum claims already processed. Nations that refuse to welcome the migrants will have to pay financial penalties. The quota system however has the drawback of not considering the aspirations of asylum applicants who may have acquaintances, ties and desires that do not necessarily coincide with their assigned destinations. It will also be necessary to avoid hazardous voyages by sea, without preventing those who are escaping from reaching safe havens. The decision was adopted exceptionally by a qualified majority rather than unanimously, making it clear and evident that there was a split between the countries ready to commit themselves as a sign of greater solidarity, and others reluctant to assume their responsibilities, among these especially the countries of eastern Europe. Thus, the plan of the European Commission to relocate 120 thousand asylum applicants in obvious need of international protection was approved, but unfortunately, as is clear from the reports of the Commission on the progress achieved regarding mechanisms of emergency relocation and resettlement, to date we cannot say that the goal has been reached as the number is much lower than had been envisaged²¹.

²¹ EC, *Ricollocazione e reinsediamento Gli Stati membri dell'UE devono agire per sostenere l'attuale gestione dei flussi* (Brussels: EC, 2016); See also: EC, *Refugee Crisis: European Commission takes decisive action* (Strasbourg: EC, 2016).

The substantial failure of the quota system led the EU to outsource not only border controls, a practice begun some time ago, but also the “reception” of asylum applicants and management of migrations directed toward Europe, as had partly already been foreseen by the May 2015 *European Agenda on Immigration*²².

Also emblematic regarding cooperation with Third Countries is the Statement the EU signed with Turkey in March 2016²³: not an agreement in the technical sense, but an understanding, one that is removed from ordinary procedures to reach an agreement, that is from the intervention of the European Parliament and oversight by the ECJ. This is a document – whose juridical nature is not clear - that leads to significant consequences regarding the fate of persons, as it assigns to Turkey the responsibility of receiving asylum applicants and processing procedures to review requests for protection on behalf of the EU, even though aware that said country has never renounced the so-called geographic reservation included in the 1951 *Geneva Convention* and that, strictly speaking, only European citizens could be granted refugee status in that country (the situation has remained more or less the same following the rather modest legislative actions taken by the Turkish government in March 2016). In addition, notwithstanding the denouncements of NGOs²⁴, testifying to the violence and abuse to which the asylum applicants in Turkey are subjected, the undignified conditions of reception/detention centers, Syrian children exploited and forced to work in Turkish factories²⁵, and in spite of the fact that Turkey is building a wall along its border with Syria²⁶, the Statement is considered a model of reference for cooperation with Third countries. The scheme adopted is the “one to one” plan: for every “unauthorized” Syrian asylum seeker that Turkey receives from European borders, the EU receives a Syrian asylum seekers from Turkey. All part of a vaster context that contemplates financial aid to the Turkish government, guarantees relating to negotiations for visas to Turkish citizens and Turkey’s membership in the EU.

We are not convinced that Turkey, like other “priority countries” identified by the Commission, can be considered safe in respect of international standards on human rights, and specifically according to the ECtHR’ case law. The latter has always firmly stated that it is not sufficient for the country to which the migrant is transferred to have ratified human rights treaties to eliminate the risk of torture and inhuman and degrading

²² EC, AIDA/ECRE, *Admissibility, responsibility and safety in European asylum procedures* (2016).

²³ EC, EU-Turkey statement, 18 March 2016, (2016); See also: Gloria Fernandez Arribas, "The EU-Turkey Agreement: A Controversial Attempt at Patching up a Major Problem", *European Papers Insight*, 1:3 (2016) at 1.

²⁴ "Turkey: Border guards kill and injure asylum seekers", *Human Rights Watch* (10 May 2016), online: <<https://www.hrw.org/news/2016/05/10/turkey-border-guards-kill-and-injure-asylum-seekers>>;

"Turkey violently rejects asylum seekers and clamps down on human rights" *European council on refugees and exiles* (13 May 2016), online: <<https://www.ecre.org/turkey-violently-rejects-asylum-seekers-and-clamps-down-on-human-rights/>>; "UN: Press Turkey to open border", *Human rights watch* (20 May 2016), online: <<https://www.hrw.org/news/2016/05/20/un-press-turkey-open-border>>.

²⁵ "I bambini siriani sfruttati in Turchia per produrre vestiti da vendere in Europa" *TPI news* (24 October 2016), online: <<http://www.tpi.it/mondo/regno-unito/bambini-siriani-rifugiati-turchia-sfruttati-vestiti-regno-unito>>.

²⁶ Orhan Coskun & Daren Butler, "Turkey to complete Syria border wall within 5 months", *Reuters* (28 September 2016), online: <<http://www.reuters.com/article/us-mideast-crisis-syria-turkey-idUSKCN11Y1MB>>.

treatment. On the contrary, it is essential that human rights be tangibly respected. On the other hand, even EU secondary legislation, and specifically Art. 38 of *Directive 2013/32/EU* (the “procedures” directive), sets out that for a Third country to be considered “safe” it must comply with a series of conditions, among which is respect of the principle of *non-refoulement*, and must offer the possibility for the person in flight to apply for refugee status and to be granted protection in compliance with the *Geneva Convention*. Furthermore, state authorities should perform an individual review of the concrete case to verify that the person does not run the risk being subjected to persecution or grievous harm²⁷.

One final observation concerns Italy, a country that, at Art. 10, para. 3 of the *Constitution* includes a provision on the right of asylum that is among the most advanced in Europe, a provision that calls for the acceptance of persons who do not enjoy fundamental rights, thus not only those who are persecuted, as set out in the 1951 *Geneva Convention*. It is nevertheless a fact that, to date, there is no organic law that implements this constitutional principle, and only the “substitutive responsibility” of the judge has at times obviated this deficiency (see the decision of the *Corte di Cassazione*, Joint Civil Sections, 26 May 1997, No. 4674).

History teaches that the civilizations that have placed walls to the arrival of migrant populations have quickly been crushed and defeated, while openings and the “melting pot” have encouraged the social, economic and civil progress of States. Modern Europe is the daughter of the “silk road”, of exchanges between fixed and nomad cultures taking place through an open corridor that allows for the flow of life. In addition, over the past decade research has highlighted the connection that exists between migration and local development, not only in the territories of reception but also in those of origin thanks to the transnational activism that the diaspora, once integrated into the economic-social fabric of the country of reception, provides to the benefit of the country of origin. Europe has chosen to found a supranational Union by tearing down walls. Foreign citizens residing in Europe are approximately 35 million, 8.4% of the population. In twenty years, between 1990 and 2010, Europe has attracted 28 million migrants, three times the number arriving between 1970 and 1990. It is thanks to them that Europe has developed and grown. But what does the future hold in this time of crisis, of a return to nationalisms and walls? The future, in a Europe that is collapsing demographically and that sees a 30% increase in the number of senior citizens and a 29% decrease in the number of young people over the next twenty years, lies in welcoming new migrants; not as a social duty but as an inevitable project if we are to ensure the future of the “common European home”. In other words, Europe, with

²⁷ On the EU-Turkey Declaration see: EC, *Il Tribunale dell’UE si dichiara incompetente a conoscere dei ricorsi di tre richiedenti asilo avverso la dichiarazione UE-Turchia diretta a risolvere la crisi migratoria*, (Luxembourg: EC, 2017).

a demographic growth factor three quarters of which is attributable to migration, can be saved only by migrants.

In conclusion, it is our belief that the time has come to exit the logic of emergency. It is time for the EU and the individual States to finally formulate a real and lasting policy to manage migrations, a shared policy that finally implements the *Lisbon Treaty* and the *CFR*. Because the true emergency, as we well know, is the South-South emergency, with four million Syrian refugees in Lebanon and Jordan, a territory that is significantly more contained than that of the 27 Member States of the Union. The priority is to act on the causes that induce migrants to leave. Secondly, any decision concerning management of migration flows cannot negate the foundation and essence of European Union legislation, and thus the imperatives of “solidarity” and respect of human rights. Finally, cooperation among States is indispensable for the prevention and repression of crimes connected to migrant trafficking managed by transnational criminal organizations²⁸.

²⁸ For all issues discussed refer to: EU, *Jean Monet centre of excellence on migrants' rights in the Mediterranean*, online: <<http://www.jmcmigrants.eu/>>.